Supreme Court, U.S.
FILED

NO. 941603 FEB 21 1995

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

LOREN R. SMITH,

Petitioner,

V.

BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM, ET AL,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

APPENDIX

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80 pp

APPENDIX TABLE OF CONTENTS

Appendix "A"	Stipulated Findings of Fact.
Appendix "B"	Trial Stipulation.
Appendix "C"	Finding of Fact.
Appendix "D"	Trial Court Judgment.
Appendix "E"	Excerpts of federal questions raised below.
Appendix "F"	Judgment of Court of Appeals.
Appendix "G"	Opinion of the Court of Appeals for the First District of Texas, rendered March 10, 1994, published at 874 S.W.2d 706.
Appendix "H"	Order of the Court of Appeals for the First District of Texas Overruling Appellant's Motion for Rehearing, rendered April 28, 1994.
Appendix "I"	Order of the Texas Supreme Court Denying Petitioner's Application for Writ of Error, rendered October 6, 1994.
Appendix "J"	Order of the Texas Supreme Court Overruling Petitioner's Motion for Rehearing, rendered November 22, 1994.

APPENDIX TABLE OF CONTENTS (cont.)

Appendix "K" Excerpts from R. Brown and D. Johnson, *A Study of the Economic Impact of Variation in the Nonresident Tuition Rate at Public Institutions of Higher Education in South Dakota*, Business Research Bureau, The University of South Dakota, Bulletin Number One Hundred Thirty-Two, ERIC Reports No. ED 314 981, HE 023 140, 1987.

Appendix "L" Excerpts from M. Olivas, *Testimony of Professor Michael A. Olivas before the Texas Legislature House Committee on Higher Education*, March 11, 1985, Institute for Higher Education Law and Governance, University of Houston.

Appendix "M" Texas Admin. Code § 21.23 (West 1993-94).

APPENDIX "A"

NO. 90-064282

LOREN R. SMITH, Plaintiff VS. BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM, Defendant.	§ § § § § § § § § § §	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 125TH JUDICIAL DISTRICT

STIPULATED FINDINGS OF FACT

On hearing the trial on the merits of this cause, and the Court having heard testimony and received other evidence, hereby makes the following findings of fact, as stipulated by the parties:

1. At the time of commencement of this case, Plaintiff was a law student at the University of Houston.

2. Plaintiff was born in Indianapolis, Indiana, on May 7, 1963.

3. Plaintiff attended school as an undergraduate at Indiana University, and

received a Bachelor of Science degree in August 1985.

4. Immediately after graduation from Indiana University, Plaintiff moved to Stow, Ohio to work full-time for two years as a systems analyst.

5. Plaintiff applied to and was accepted to attend Law School at the University of Houston Law Center beginning August 1987.

6. Plaintiff resigned from his position in Ohio in early August 1987, and moved to Houston a week later.

7. Plaintiff enrolled in the University of Houston Law Center in August of 1987, just two (2) weeks after moving to Texas.

8. Prior to moving to Texas in 1987, Plaintiff had only been to Texas once, to attend an ROTC camp in Corpus Christi at age 15 or 16.

9. Plaintiff came to Texas in August 1987 for the immediate purpose of attending law school, with the hope that he would find gainful employment in Houston upon graduation.

10. Plaintiff applied to four law schools, three in California and one in Texas. In addition to being accepted to the University of Houston, Plaintiff was accepted to a law school in Los Angeles.

11. From August 1987 to the present, Plaintiff has continuously leased apartments in this state.

12. As of the date of Plaintiff's first application for reclassification, Plaintiff possessed a Texas Drivers license, a Texas Vehicle Registration and a Texas Voter Registration Certificate.

13. Plaintiff has been continuously employed in this state (either part-time or full time) since March 1988. On March

15, 1988, during his first year of law school, Plaintiff began a position as a law clerk with the Houston firm of Hughes, Watters & Askanase. Plaintiff has worked there ever since, presently as an associate attorney of the firm.

14. Plaintiff did not reside in Texas 12 months prior to his enrollment in the University of Houston Law Center and therefore was classified as a non-resident in accordance with Tex. Educ. Code Ann. § 54.052(f)(Vernon 1987).

15. Plaintiff never satisfied the requirements of Tex. Admin. Code § 21.22(d) for reclassification. Plaintiff was refused reclassification after each of his five applications either because he was not in Texas for the prior 12 months before his enrollment in the University, and he was therefore deemed to have come to Texas "to go to school", and/or he had

not been employed full-time in the state for an entire year while enrolled in school at less than part-time status.

17. Plaintiff paid the following sums of money representing the difference between nonresident and resident tuition, on the following dates, by virtue of never being classified as a resident for tuition purposes:

Fee payment Date	Resident rate per/hr	Non-resident rate per/hr	Difference per/hr	Hours Billed	Total
8-14-90:	$90.00	$180.00	$90.00	6	$ 540.00
1-02-90:	$90.00	$180.00	$90.00	9	$ 810.00
8-10-89:	$90.00	$180.00	$90.00	16	$1,440.00
12-15-88:	$75.00	$165.00	$90.00	15	$1,350.00
8-31-88:	$75.00	$165.00	$90.00	11	$ 990.00
12-22-87:	$48.00	$150.00	$102.00	15	$1,530.00
8-25-87:	$48.00	$150.00	$102.00	16	$1,632.00

18. The University has reclassified

a considerable number of students to resident status after these students were initially classified as non-residents, students who satisfied the requirements enunciated by the Coordinating Board, Texas College and University System, as found in 19 Tex. Admin. Code § 21.22(d). The officials of the University are neither more liberal or less liberal in their evaluation of reclassification requests than the dictates of the Coordinating Board, as enunciated in the Administrative Code, and in exercising their discretion in determining whether the students have satisfied these *dictates.

19. Professors Ralph J. Brown and Dennis A. Johnson of the University of South Dakota testified as experts on behalf of the Plaintiff. Professor Michael A. Olivas of the University of

Houston testified as an expert on behalf of the Defendants. Professor Olivas also testified as a fact witness, having sat on the appeals committee that denied Plaintiff's request for reclassification. The Court finds all three to be qualified experts in their areas of expertise.

Signed the 15th day of November, 1992.

/s/ Don G. Humble
Honorable District Court Judge

APPROVED:

/s/ Loren R. Smith
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ATTORNEY FOR DEFENDANTS

APPENDIX "B"

NO. 90-064282

LOREN R. SMITH,	§	IN THE DISTRICT
	§	COURT OF
Plaintiff	§	
	§	
VS.	§	HARRIS COUNTY,
	§	TEXAS
BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM,	§	
	§	
	§	
	§	125TH JUDICIAL
Defendant.	§	DISTRICT

TRIAL STIPULATION

WHEREAS the parties to this agreement, Loren R. Smith ("Plaintiff") and the Board of Regents of the University of Houston System, Mario C. Lucchesi, Officially and Individually, and Patricia M. Cavanaugh, Officially and Individually ("Defendants") are parties in the above-styled lawsuit;

WHEREAS the parties have entered into the following agreement:

1. The parties stipulate that a reasonable attorney's fee for the

Plaintiff's prosecution of this case is as follows:

a. The amount of $10,000.00 for the trial of this lawsuit;

b. The amount of $5,000.00 if the case is appealed to the Court of Civil Appeals;

c. The amount of $3,500.00 if the case is appealed to the Texas Supreme Court;

d. The amount of $5,000.00 if the case is appealed to the United States Supreme Court.

The parties, however, do not stipulate that the Plaintiff is legally entitled to recover a reasonable attorney's fee.

2. The parties stipulate that all exhibits listed by the parties in their respective "Exhibit List of Plaintiff" and "Defendant's Exhibit List", attached to

the Joint Pretrial Order filed in this case, are admissible for all purposes, and will be deemed admitted at the outset of the trial.

Dated this 23rd day of July, 1992.

/s/ Loren R. Smith
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ATTORNEY FOR DEFENDANTS

APPENDIX "C"

NO. 90-064282

LOREN R. SMITH,	§	IN THE DISTRICT
	§	COURT OF
Plaintiff	§	
	§	
VS.	§	HARRIS COUNTY,
	§	TEXAS
BOARD OF REGENTS OF	§	
THE UNIVERSITY OF	§	
HOUSTON SYSTEM,	§	
	§	125TH JUDICIAL
Defendant.	§	DISTRICT

FINDING OF FACT

Professors Ralph J. Brown and Dennis A. Johnson of the University of South Dakota testified at trial on behalf of the Plaintiff regarding econometric models, and the statistical effect of fluctuations in the rate of nonresident tuition on enrollment. The Court has received no evidence at trial that disputed the findings of Professors Brown and Johnson, and finds their conclusions and opinions to be credible.

Signed the 15th day of November,

1992.

/s/ Don G. Humble
Honorable District Court Judge

APPROVED:

/s/ Loren R. Smith
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APPENDIX "D"

NO. 90-064282

LOREN R. SMITH,	§	IN THE DISTRICT COURT OF
Plaintiff	§	
VS.	§	HARRIS COUNTY, TEXAS
BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM,	§	
Defendant.	§	125TH JUDICIAL DISTRICT

FINAL JUDGMENT

On the 23rd day of July, 1992, came on to be heard the above-entitled and numbered cause, wherein Loren Smith is Plaintiff and Board of Regents of the University of Houston System, Mario C. Lucchesi and Patricia M. Cavanaugh are Defendants. Came on the parties in person and/or through their representatives, and by an through their attorneys of record and announced ready for trial. The parties proceeded to trial before the court - neither party having requested

trial by jury. The court thereafter reviewed the pleadings and briefs and heard the evidence and argument of counsel. The court finds that Plaintiff's causes of action against Defendants are not meritorious and that judgment should be rendered for Defendants and against Plaintiff.

It is therefore ORDERED, ADJUDGED and DECREED by the Court that:

1. Plaintiff, Loren Smith, take nothing by his suit against Defendants, Board of Regents of the University of Houston System, Mario C. Lucchesi and Patricia M. Cavanaugh (in both of their official and individual capacity; and
2. Costs of Court are taxed against the party incurring same.

Signed the 13th day of October, 1992.

/s/ Don G. Humble
JUDGE PRESIDING

APPENDIX "E"

POINT NO. 1: The trial court erred in not holding Appellees' reclassification policy violates the Equal Protection clause of the United States Constitution, as the policy is not a test of bona-fide residency, and does not satisfy even minimum scrutiny.

POINT NO. 2: The trial court erred in not holding Appellees' reclassification policy violates the due process clause of the United States Constitution, as it creates an impermissible irrebuttable presumption.

POINT NO. 3: The trial court erred in not holding Appellees' reclassification policy violates the Due Process Clause of the United States Constitution, as it is arbitrary and capricious.

POINT NO. 4: The trial court erred in not holding Appellees' reclassification policy violates the Equal Protection clause of the United States Constitution, as the policy impinges on the fundamental right to travel, but does not satisfy the applicable test of "strict scrutiny".

POINT NO. 5: The trial court erred in not mandating a pure durational test in determining residency, as the domicile test is unworkable and constitutional infirm.

POINT NO. 6: The trial court erred in not holding the one year waiting period to qualify for reclassification violates equal protection, for requirement does not withstand strict scrutiny.

POINT NO. 7: The trial court erred in not holding the distinction between residents and non-residents for tuition purposes violates the equal protection clause of the United States Constitution, as there is no compelling state interest for the distinction.

. . . .

(2) The Court could mandate a pure durational test in determining residency, i.e., a student would automatically qualify after continuous residence in the state for one year (including the summer months), without regard to the nebulous concept of "domicile". (Point No. 5).

. . . .

(3) The Court could hold the one year waiting period to qualify for reclassification violates equal protection, or even the distinction between residents and non-residents for tuition purposes violates equal protection, as there is no compelling

state interest for the distinction. (Point Nos. 6,7). . . .

APPENDIX "F"

(seal)

Court of Appeals

First District of Texas

LOREN R. SMITH,
Appellant

V.

BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM, MARIO C. LUCCHESI, AND PATRICIA M. CAVANAUGH, APPELLEES

Appeal from the 125th District Court of Harris County, Texas (Tr. Ct. No. 90-064282).

NO. 01-93-00108-CV

Opinion delivered by Justice Hutson-Dunn, Chief Justice Oliver-Parrott and Justice Mirabal also sitting

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on October 13, 1992. After hearing the cause on the record of the court below and inspecting the same, it is the opinion of this Court that there was no error in the judgment. It is therefore **CONSIDERED, ADJUDGED, AND ORDERED** that the judgment of the court below be **affirmed** in all respects.

It is further **ORDERED** that appellant, LOREN SMITH, pay all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Chief Justice Oliver-Parrott, Justices Hutson-Dunn and Mirabal.

Judgment entered March 10, 1994.

APPENDIX "G"

Judgment affirmed and Opinion filed March 10, 1994

(seal)

In The
Court of Appeals
For The
First District of Texas

NO.01-93-0108-CV

LOREN R. SMITH, Appellant
V.
BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM, ET AL, Appellee

---

On Appeal from the 125th District Court of Harris County, Texas
Trial Court Cause No. 90-64282

OPINION

Plaintiff, Loren R. Smith, a law student at the University of Houston[1], brings this action challenging the constitutionality of the policy of the University of Houston and the Coordinating

---

[1] Since the filing of this lawsuit, Smith has graduated from the University of Houston Law Center.

Board, Texas College and University System, for determining whether a nonresident student may be reclassified as a resident to qualify for resident tuition status.

BACKGROUND

Smith was born in Indianapolis, Indiana, on May 7, 1963. He received a Bachelor of Science degree from Indiana University in August 1985. After graduation, Smith moved to Stow, Ohio, and worked full time for two years as a systems analyst. Smith them decided to go to law school, and applied to schools in both Texas and California. Plaintiff was accepted to the University of Houston, resigned his position in Ohio, and moved to Texas in August 1987. Two weeks after arriving in Texas, Smith began his studies as a full-time student at the University of Houston Law Center.

In August 1988, after attending the University of Houston for one year, Smith applied to the university to be reclassified as a resident for tuition purposes. His request was refused. He filed applications renewing his request for reclassification before each of his remaining semesters at the University of Houston. Each of these requests was also denied. After his application was refused for the fall of 1990, Smith filed this lawsuit. Because Smith was classified as a nonresident, he paid tuition totalling $14,520 during his tenure in law school. Had he been classified as a resident, he would have paid $6,228.

While in law school, Smith worked part-time for a law firm in Houston. During the summers, he was able to work full-time at the law firm. However, he never maintained long term, full-time

employment. Smith had a Texas driver's license, was registered to vote in Texas, rented an apartment in Texas, and registered his car in Texas. He testified at trial that while a law student, he only left the state once. When asked why he came to Texas when he first applied for reclassification in the fall of 1988, Smith answered, "to live, attend school, and work." When he applied for reclassification in the fall of 1989, Smith declared that his purpose in coming to Texas was "to attend law school, and live and work here after graduation." When he applied in the spring of 1990 he declared that he came to Texas "to reside."

SUMMARY OF SMITH'S CONTENTIONS

In points of error two, three, and eleven, Smith contends that the reclassification policy violates the due

process clause of the fourteenth amendment of the United States Constitution because 1) it creates and irrebuttable presumption of nonresidency, and 2) it is arbitrary and capricious.

In points of error one, four, five, six, seven, and eight, Smith also argues that the State's reclassification policy violates the equal protection clause of the fourteenth amendment of the United States because it is not a bona fide residency requirement. He contends that the reclassification policy infringes upon the fundamental right to travel, and thus is subject to the strict scrutiny standard of review, rather than the more deferential rational basis analysis. In points of error nine and ten, Smith further argues that the reclassification policy violates the due process and equal protection clauses of the Texas

Constitution because it may be construed to provide greater protection than the United States Constitution. Finally, in points of error twelve and thirteen, Smith argues that the University breached a contract, either implied-in-law or implied-in-fact, by failing to reclassify him as a resident.

Smith believes that he is entitled to a refund of the difference between the amount he paid for nonresident tuition and the amount he would have paid had he been classified as a resident. In his fourteenth point of error, he also alleges that he is entitled to recover attorney's fees.

THE APPLICABLE STATUTES AND RULES

The statutes at issue in this case provide:

> (f) An individual who is 18 years of age or over who resides out of state or who has come from outside Texas and who registers in an educational

> institution before having resided in Texas for a 12-month period shall be classified as a non-resident student.

Tex. Educ. Code Ann. § 54.052(f) (Vernon 1987).

> A nonresident student classification is presumed to be correct as long as the residence of the individual in the state is primarily for the purpose of attending an educational institution. After residing in Texas for at least twelve (12) months, a nonresident may be reclassified as a resident student as provided in the rules and regulations adopted by the Coordinating Board, Texas College and University System. Any individual reclassified as a resident student is entitled to pay the tuition fee for a resident of Texas at any subsequent registration as long as he continues to maintain his legal residence in Texas.

Texas Educ. Code Ann. § 54.054 (Vernon 1987).

> Persons classified as nonresidents upon first enrollment in an institution of higher education are presumed to be nonresidents for the period during which they continue as students. If such nonresident students withdraw from school and reside in the state while gainfully employed for a period of 12 months, upon reentry into an institution of higher education they will be entitled to be reclassified as residents for tuition purposes.

Accumulations of summer and other vacation periods do not satisfy this requirement. Reclassification to resident status after residing in the state for 12 months cannot be based solely upon the student's or the student's spouse's employment, registration to vote, registration of a motor vehicle and payment of personal property taxes thereon, or the securing of a Texas driver's license. *The presumption of "nonresident" is not a conclusive presumption, however, and other facts may be considered to determine if the presumption has been overcome. Material to this determination are business or personal facts or actions unequivocally indicative of a fixed intention to reside permanently in the state. Such facts may include, but are not limited to, the length of residence and full-time employment prior to enrolling in the institution, the fact of full-time employment prior to enrolling in the institution, the fact of full-time employment and the nature of such employment while a student, purchase of a homestead with a substantial down payment, or dependency upon a parent or guardian who had resided in Texas for at least 12 months immediately preceding the student's enrollment.* All of these facts are weighed in the light of the fact that a student's residence while in school is primarily for the purpose of education and not to establish residence, and that decisions of an individual as to residence are generally made after the completion

> of an education and not before. Students classified as nonresident students shall be considered to retain that status until they make written application for reclassification in the form prescribed by the institution and are officially reclassified in writing as residents of Texas by the proper administrative officers of the institution. Application for reclassification must be submitted prior to the official census date of the relevant term.

Texas Admin. Code § 21.23 (West 1993-94)(emphasis added).

It is important to note that Smith does not challenge his initial classification as a nonresident, but contends that he should have been reclassified as a resident when he first applied for reclassification in the fall of 1988. Therefore, the constitutionality of the first statute listed above is not an issue in the case. The issue presented to this Court is whether the rules regarding the reclassification of nonresidents pass constitution muster. In

an effort to resolve this issue, we will discuss each of Smith's claims of constitution deprivation separately.

DUE PROCESS

Smith claims that the reclassification policy violates his right to due process because it creates an irrebuttable presumption of nonresidency that cannot be overcome while remaining a full-time student. Smith's claim is based on the landmark case of *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230 (1973). In *Vlandis*, the Court declared a Connecticut statute unconstitutional because it permanently classified students as nonresidents for tuition purposes on the basis of their legal address at the time they applied to the university.

> [I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily

> or universally true in fact, and when the State has reasonable alternative means for making the crucial evaluation.

Vlandis, 412 U.S. at 452, 92 S.Ct. 2236.

Unlike the Connecticut statute, the reclassification rules in Texas do not permanently "freeze" a student in a nonresident status based on the student's classification at the time of application to the university. A student may obtain reclassification in any number of ways. First according to the policy on reclassification, a student will be entitled to reclassification if he or she withdraws from the University for a period of twelve months, and resides in Texas while gainfully employed. Secondly, the statute lists several factors that may result in reclassification. For example, a student may work full time in Texas, while enrolled as a student, or may purchase a homestead in Texas. Dependency

on a parent or guardian who has resided in Texas for at least 12 months is also a factor that may result in reclassification. However, the factors listed in the statute are nonexclusive; therefore, presumably there are other circumstances that would result in reclassification. The rule in question also indicates that the "presumption of 'nonresident' is not a conclusive presumption," and may be overcome by showing "facts or actions unequivocally indicative of a fixed intention to reside permanently in the state."

In *Black v. Sullivan*, 561 F.Supp. 1050, 1064-65 (D. Maine 1983), the plaintiffs claimed that a similar classification policy created an irrebuttable presumption that full-time, unmarried students were unable to overcome. The court rejected the claim

because the rules on their face did not exclude such persons from reclassification, and the plaintiffs were given a fair opportunity to demonstrate entitlement to reclassification.

We conclude that, though the burden of proof may be difficult for students such as Smith to overcome, the rules promulgated by the Coordinating Board, Texas College and University System, do not create an irrebuttable presumption.

Smith also contends that the reclassification policy violates his right to due process because it is arbitrary and capricious. Smith apparently contends that because he presented sufficient evidence to show that he was a resident of Texas for other purposes, (i.e., voting, driver's license, car registration) he should also be considered a resident for purposes of in-state tuition. We

disagree. In *Michelson v. Cox*, 476 F.Supp. 1315, 1318-20 (S.D. Iowa 1979), the plaintiff introduced evidence that he was registered to vote in Iowa, had obtained an Iowa driver's license, had registered his car in Iowa, paid rent in Iowa, paid income taxes in Iowa, and intended to take the Iowa bar examination. Plaintiff claimed that this evidence, coupled with his statement that he intended to remain in Iowa, was sufficient to overcome the presumption of nonresidency, and that the school's refusal to reclassify him was arbitrary and capricious.

The court in *Michelson* rejected this argument stating:

> To accept plaintiff's argument would require the University to reclassify as a resident every student who, after attending the University for a year, makes a self-serving declaration that he intends to reside in Iowa permanently and performs a series of "objective" acts, some of

> which are required by law and all of which are customarily done by some nonresident students who do not intend to remain in Iowa after graduation. This would, in effect, create a presumption that any such student *is* a bona fide Iowa resident, thus seriously jeopardizing the University's nonresident tuition program and consequently its entire financial structure. It would remove the tuition decision from the hands of the University and place it in the student's.

Michelson, 476 F.Supp. at 1320.

In *Spielberg v. Board of Regents, University of Michigan*, 601 F.Supp 994, 999-1001 (E.D. Mich. 1985), the plaintiff applied for reclassification and introduced proof that her car was registered and insured in Michigan, that she had a Michigan driver's license, that she voted in Michigan, that she had a Michigan bank account, and that she paid taxes as a Michigan resident. Plaintiff contended that the university's failure to reclassify her in light of this evidence was arbitrary and capricious. The court,

citing *Michelson*, rejected plaintiff's arguments and stated, "[w]hile it is true that the evidence plaintiff offered is consistent with an intent to remain in Michigan, it is equally consistent with an intent to leave Michigan upon graduation." *Id.* at 1001.

We find that the evidence presented by Smith is not such that the refusal to reclassify him as a resident was arbitrary and capricious. A great many nonresident students in Texas obtain Texas driver's licenses, register their cars in Texas, obtain insurance in Texas, rent apartments in Texas, and work in Texas on summer breaks. Nevertheless, many of those students have no intention of remaining in Texas after graduation. Therefore, the refusal to reclassify students as residents automatically based on such evidence is neither arbitrary, nor

capricious.

Because we find that the reclassification rules do not create an irrebuttable presumption of nonresidency, and are not arbitrary or capricious, Smith's points of error relating to due process under the fourteenth amendment of the United States Constitution are overruled.

EQUAL PROTECTION

Smith also claims the State's reclassification policy, and particularly its one-year waiting period, violates his right to equal protection of the laws as guaranteed by the fourteenth amendment of the United States Constitution. Smith argues that the policy impinges on the fundamental right to travel, and should be subject to a strict scrutiny standard of review.

The first case to strike down a

durational residency requirement on the grounds that it impinged upon the fundamental right to travel was *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322 (1969). In *Shapiro*, the Court struck down a one-year waiting period to be eligible for welfare benefits, holding that it penalized the fundamental right to travel. 394 U.S. at 629-31, 89 S.Ct. 1328--29. The case of *Dunn v. Blumstein*, 405 U.S. 230, 360, 92 S.Ct. 995, 1012 (1972), struck down a one-year waiting period to vote in state elections. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 269, 94 S.Ct. 1076, 1088 (1974), struck down a statute that required a one-year waiting period before a new resident could apply for subsidized medical care. As can be seen from these cases, the earliest "right to travel" cases involved the denial of basic rights and necessities to

newcomers in the state.

More recent "right to travel" cases have involved statutes that create permanent distinctions among admittedly bona fide residents based on the length or timing of their residence in the state. In *Zobel v. Williams*, 457 U.S. 55, 65, 102 S.Ct. 2309, 2315 (1982), the state of Alaska sought to apportion certain oil dividend benefits among its residents according to how long the resident had resided in the state. The Court did not reach the right to travel issue because it found that the statute violated even the minimum standard of review because the state was discriminating among its own residents. In *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 911, 106 S.Ct. 2317, 2325 (1986), the Court invalidated a New York statute that awarded a civil service employment

preference to veterans of New York who were also New York residents at the time they served their county. The Court held that this statute violated equal protection because it favored prior resident veterans over resident veterans who had moved to New York after serving their county. *Id.* The Court found that such a distinction between bona fide residents based on length of their residency penalized persons who exercised their constitutional right of interstate migration. *Id.*

We find the reclassification statute distinguishable from either of the two situations in which a statute has been invalidated because it impinged upon the fundamental right to travel. The reclassification statute, and its one-year waiting period, does not involve a basic right or necessity, such as those found in

the *Shapiro* line of cases. The right to receive a lower tuition rate at a state university cannot be equated to the right to receive welfare benefits, medical care, or the right to vote. Neither does the reclassification statute, on its face, seek to apportion or limit the benefits accorded to the citizens of Texas based on the length or timing of their residence. Instead, the reclassification policy seeks to establish which students are in fact bona fide residents of the state of Texas.

We have found no cases that have invalidated a residency requirement for tuition purposes on the basis that it burdens the right to interstate travel. The first case to reject a "right to travel" argument in the context of nonresident tuition was *Starns v. Malkerson*, 326 F.Supp 234, 328 (D. Minn. 1970), *summarily aff'd*, 401 U.S. 985, 91

S.Ct. 1231 (1971). *Hooban v. Boling*, 503 F.2d 648, 651 (6th Cir. 1974), *cert. denied*, 421 U.S. 920, 95 S.Ct. 1585 (1975), also rejected a "right to travel" contention in the context of nonresident tuition as "completely without merit." *Id.* In *Weaver v. Kelton*, 357 F.Supp. 1106, 1110 (E.D. Texas 1973), the very same statute involved in the present case was upheld by the federal district court. In so doing, the court concluded that the right to interstate travel was not involved.

Furthermore, if we determine that the reclassification statute creates a test of bona fide residency, we must conclude that the right to travel is not burdened, "for any person is free to move to a State and to establish residence there." *Martinez v. Bynum*, 461 U.S. 321, 328, 103 S.Ct. 1838, 1842 (1983).

In *Vlandis*, the Court recognized that

> [A] State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis . . . . *The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, if fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state tuition.*

Vlandis, 412 U.S. at 452-54, 93 S.Ct. at 2236-37. (emphasis added).

Thus, the critical issue this Court must decide is whether the reclassification statute, and the criteria it considers to determine residency for tuition purposes, sets up a test to determine bona fide residency. "Although the meaning may vary according to context, 'residence' generally requires both physical presence and an intention to remain." *Martinez*, 461 U.S. at 330, 103

S.Ct. at 1843.

We find that the criteria set forth in the reclassification rules allows the state to make "virtually certain" that the students to whom it grants the benefits of residency are in fact bona fide Texas residents. For example, it is reasonable to assume that a nonresident student who works full-time has come to the state for the primary purpose of working in the state and making it his home, and not for the primary purpose of taking advantage of Texas' educational system. However, a full-time student who is claiming resident status may be motivated solely by a desire to escape the tuition surcharge, and not by any particular ties to the state. Likewise, it is reasonable to assume that a nonresident student who is a dependent of a Texas resident, or a nonresident student who purchases a homestead in Texas

has established some sort of permanent ties to the state, evidencing an intent to remain in the state. We are not willing to require the state universities to reclassify every student who comes from out-of-state, obtains a Texas driver's license and/or other easily obtainable indicia of residency, and declares his intent to remain in the state after graduation. Thus, we find that the factors set forth in the reclassification statute create a test of bona fide residency for the purpose of resident tuition status. Smith's points of error relating to equal protection under the fourteenth amendment of the United States Constitution are overruled.

TEXAS CONSTITUTIONAL RIGHTS

Smith also argues that even if we determine that the reclassification policy does not violate the due process or equal

protection clauses of the United States Constitution, we may nonetheless find that the Texas Constitution has been violated. We agree that the Texas Constitution may be interpreted to provide greater rights than the United States Constitution. *Davenport v. Garcia*, 834 S.W.2d 4, 11-12 (Tex. 1992). However, Smith has cited no case law to indicate that such an interpretation is required in this case. Smith's points of error under the due process and equal protection clauses of the Texas Constitution are overruled.

BREACH OF CONTRACT

Smith has also claimed that he had a contract with the University, and that the University breached the contract by failing to reclassify him as a resident. Even if we were to assume that a contract existed between Smith and the University, we would necessarily conclude that there

was no breach of that contract because the University correctly classified Smith as a nonresident for purposes of tuition. Smith's points of error concerning breach of contract are overruled.

CONCLUSION

Because we have determined that the reclassification rules promulgated by the Coordinating Board, Texas College and University System, do not set up an irrebuttable presumption of nonresidency, but in fact create a test of bona fide residency for purposes of tuition, the judgment of the trial court is affirmed.[2]

---

[2] Given our disposition of this cause, we do not address Smith's points of error 15 through 20, relating to the issues of sovereign immunity.

/s/ D. Camille Hutson-Dunn
D. Camille Hutson-Dunn
Justice

Chief Justice Oliver-Parrott
and Justice Mirabal also sitting.

Publish. Tex. R. App. P. 90.

Judgment rendered and opinion
delivered March 10, 1994
True Copy Attest:

/s/ Margie Thompson
Margie Thompson
Clerk of Court

APPENDIX "H"

(seal)

In The
Court of Appeals
For The
First District of Texas

NO.01-93-0108-CV

LOREN R. SMITH, Appellant
V.
BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM, ET AL, Appellee

---

On Appeal from the 125th District Court of Harris County, Texas
Trial Court Cause No. 90-64282

ORDER

On this day come on to be considered the appellant's motion for rehearing. And such motion is hereby **OVERRULED.**

It is so ordered.

PER CURIAM

Panel consisting of: Chief Justice Oliver-Parrott and Justices Dunn and Mirabal

Order entered: April 28, 1994

True Copy Attest:
Margie Thompson, Clerk of the Court

/s/ Cathy McGraw
Chief Deputy

APPENDIX "I"

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

October 6, 1994

Mr. Loren R. Smith
Hughes Watters & Askanase
1415 Louisiana, 37th Floor
Houston, TX 77002

Ms. Janice S. Moss
Office of Attorney General of Texas
Dan Morales, A.G.
P.O. Box 12548
Austin, TX 78711-2548

RE: Case No. 94-0565
Style: LOREN R. SMITH
v. BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the above reference application for writ of error with the notation "Writ Denied".

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey,
Deputy Clerk

APPENDIX "J"

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

November 22, 1994

Mr. Loren R. Smith
Hughes Watters & Askanase
1415 Louisiana, 37th Floor
Houston, TX 77002

Ms. Janice S. Moss
Office of Attorney General of Texas
Dan Morales, A.G.
P.O. Box 12548
Austin, TX 78711-2548

RE: Case No. 94-0565
Style: LOREN R. SMITH
v. BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Peggy Littlefield
Peggy Littlefield,
Deputy Clerk

APPENDIX "K"

(University seal and graphic)

A Study of the Economic Impact of Variation in the Nonresident Tuition Rate at Public Institutions of Higher Education in South Dakota

Bulletin Number One Hundred Thirty-Two

Business Research Bureau
School of Business
The University of South Dakota
Vermillion, South Dakota

. . . .

Prepared for
Counsel of Presidents
Public Higher Education System
of the State of South Dakota

. . . .

By
Ralph J. Brown and Dennis A. Johnson
Professors of Economics,
School of Business,
University of South Dakota

I. INTRODUCTION

Tuition policy regarding nonresident students at public institutions of higher education has been a subject of considerable controversy. It has been argued in some quarters that nonresident tuition rates should be lowered to encourage nonresident enrollment. Proponents of this proposal often argue that geographic and economic diversity improve the educational environment of the college. (footnote omitted) Another argument for lowering nonresident tuition

rates is that in a time of declining enrollments, efficient utilization of fixed capacity and the viability of certain programs requires policies to maintain minimum enrollments. Finally, it has been argued that these students contribute financially to the state's economy through their spending.

Opponents of lower nonresident tuition rates argue that present rates represent a subsidy to nonresident students and that the first obligation of the state is to fund the educational needs of its own residents. (footnote omitted) In their view the proposed benefits of increased diversity are outweighed by the economic considerations of the nonresident tuition level relative to the cost of educating that student.

Obviously, there are important economic and noneconomic considerations in

the establishment of a proper policy regarding the setting of tuition rates for nonresident students. The purpose of this study is to attempt to provide answers to some of the more important economic questions regarding the setting of nonresident tuition rates by South Dakota public institutions of higher education. This study was designed to explore and attempt to find answers to the following economic questions.

1. What is the likely response in terms of nonresident undergraduate enrollments to a lowering of nonresident tuition rates in South Dakota public institutions of higher education? Would the increased revenue from increased enrollments be sufficient to offset the lower revenues due to reduction in nonresident tuition charges?

2. What is the cost of educating

additional nonresident students in South Dakota public institutions of higher education and is this cost more or less than the additional revenue generated by reducing the tuition rate to attract additional students?

3. What are the other economic benefits to the state's economy in terms of increased spending and tax revenues to be derived from a higher enrollment of nonresident students?

This report is organized as follows: Section II will review the historical pattern of nonresident enrollment at public institutions of higher education in South Dakota, Sections III and IV will review the demand model used to estimate the sensitivity of nonresident enrollment to tuition rates, Sections V and VI will review the cost model and the cost estimates, and Section VII will bring the

demand and cost estimates together. Section VIII will analyze the community impacts of increased enrollment and Section IX will summarize the results and findings of this study.

II. NONRESIDENT ENROLLMENT TRENDS BY SCHOOL

A. University of South Dakota

Nonresident enrollment at the University of South Dakota (USD) has come mainly from surrounding states. Of these states, nearby Iowa and Nebraska have provided the bulk of students attending USD. In 1985, 595 students came from Iowa, while 143 came from Nebraska. In addition, enrollment from . . .

(page four)

. . . .

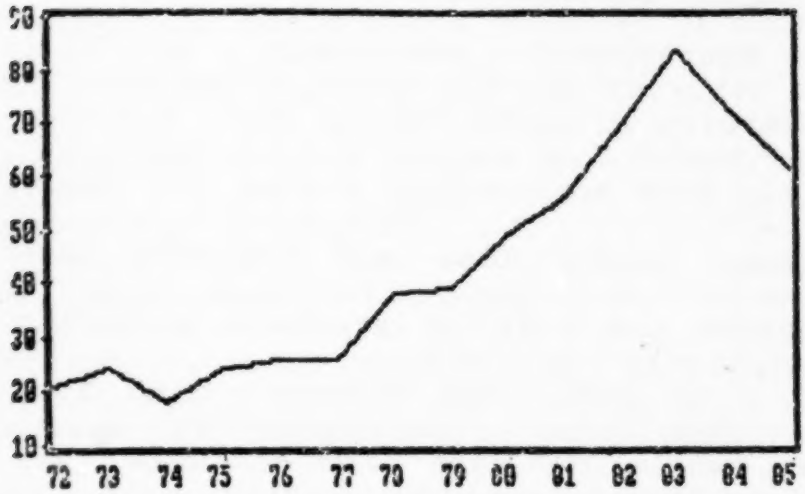
As is the case with Iowa, Minnesota enrollment at USD has declined in recent years from 115 in 1983 to 97 in 1985. Figure 2 shows that prior to 1983,

enrollment steadily increased from a low of 27 in 1976. The tuition reciprocity agreement in 1978 had a very significant impact on enrollment from Minnesota.

. . . .

(page 17)

FIGURE 13: MINNESOTA ENROLLMENT AT SDMT



Obviously, Minnesota has provided the largest number of nonresidents. Figure 14 indicates that reciprocity has had a more powerful impact effect on enrollment at SDSU than any of the other South Dakota colleges and universities. In the three

year period between 1977 and 1980, Minnesota enrollment almost quadrupled from 247 to 953. However, Minnesota has not only been SDSU's largest nonresident contributor; since 1980, its students have accounted for roughly 15 percent of the total undergraduate student body at the school. Minnesota enrollment has declined since 1981, but not nearly enough to undermine its overall importance to the school.

(page 21)

. . . .

The relationship between price and enrollment from Iowa at USD is presented in Figure 16. In this graph the left scale relates to the price (stated as the ratio of nonresident tuition in South Dakota to resident tuition in the state of origin) and the right scale relates to the enrollment level. When the price variable

the nonresident tuition rate charged by public institutions of higher education in South Dakota. We examined the price [price change from one state to the other - footnote omitted] responsiveness of enrollment from Iowa, Minnesota, Nebraska, North Dakota, Wyoming, and all other states and foreign countries at each of the six public institutions of public higher education in South Dakota.

. . . .

In most cases the long-run price elasticity of enrollment demand was price elastic. This means that the percentage change in enrollment response was greater than the percentage price change. The significance of this is that total revenue increases when the nonresident tuition rate is reduced because the revenue gain from the additional students more than offsets the revenue loss from charging the

existing students at a lower rate.

After computing the price elasticity of enrollment demand we were able to calculate the marginal revenue attributable to each additional nonresident student. We found that at the 1985-86 nonresident tuition rate of $69.50 per credit hour, the marginal revenue from each additional nonresident student ranged generally from $0 to $1,415 depending on the price elasticity of demand.

Turning to the second question relating the marginal costs of each additional nonresident student, we were able to compute marginal cost of increased undergraduate enrollment. The results of this analysis indicates that marginal instructional costs are approximately $1,500 and marginal cost of instruction, academic support, and student services summed are approximately $2,200.

Finally, to answer the third question we relied on previous studies of the spending impact of students in the college community. Based on these studies we concluded that the direct and indirect spending impact in the local community ranged from $1,296 to $3,732 per student in 1985 dollars. The state and local sales tax revenue generated per student ranged from $73.36 to $210.30 per year.

B. Conclusions

So what do we conclude from this analysis? First, it appears, assuming reasonable elasticity estimates, that a reduction in the nonresident tuition rate would significantly increase enrollment. Second, assuming a marginal revenue cost of at least $1,500 per student and a maximum marginal revenue of $1,415 per student (footnote omitted) that cutting the nonresident tuition rate would not

generate sufficient revenue to cover the additional cost.

Assuming that there is a desire to increase nonresident enrollment without being too costly to the state, what strategies could be followed? Here are a list of possible strategies that could be used.

. . . .

(page 91)

4. An additional comment relates to the negotiation of tuition rates under reciprocity agreements. For example, when the South Dakota-Minnesota tuition reciprocity agreement was first started in 1978, South Dakota students attending schools in Minnesota paid the Minnesota resident tuition rate, and Minnesota students attending schools in South Dakota paid the South Dakota resident tuition rate. When the agreement was renegotiated

in 1983, both South Dakota and Minnesota nonresident students paid the average of the South Dakota and Minnesota resident tuition rates. The effect of this renegotiation was to raise the price to Minnesotans enrolled in South Dakota and lower the price to South Dakotans enrolling in Minnesota. This change had both positive and negative effects. It tended to hurt South Dakota enrollments but increase net revenues [footnote - Net revenue is defined as the difference between marginal revenue and marginal costs.] This hurt South Dakota enrollment in two ways. First, it encouraged more South Dakota students to enroll in Minnesota. Second, it discouraged Minnesota students from enrolling in South Dakota. Furthermore, if the price elasticity is elastic, as our research indicates it is, it had the effect of

reducing revenue because the revenue lost from the fewer students was not offset by the higher revenue from the existing students. However, from a net revenue point-of-view, it probably increased net revenue because the marginal cost of educating an additional student is undoubtedly higher than the average of the two tuition rates. Therefore, the reduction in enrollment that was not covering the marginal costs increases net revenue.

APPENDIX "L"

(seal of University)

University of Houston
University Park
Houston, Texas 77004

Institute for Higher Education
Law and Governance
Farish Hall Suite 415
(713) 749-2557

Testimony of
Professor Michael A. Olivas

Colleges of Law and Education

University of Houston
University Park
Houston, Texas

before the Texas Legislature
House Committee on Higher Education

11 March 1985

. . . .

3) Residency requirements need to be revised as part of any tuition program reform.

Texas is a major "receiver" state in higher education, and college migration data show that the state not only keeps its residents in state to attend college (93%, second only to California's 95%), but "imports" thousands of highly qualified students. In 1975, Texas' net migration was 31,098 students; only California and Massachusetts -- states with superb universities -- and DC, with its prominence as the nation's capital, had more net immigration of students.(footnote omitted) In the ten years since these reported data, Texas undoubtedly has increased its attractiveness for out of state students.

I believe the current law regarding nonresidents (Section 54.054), last revised in 1971, works against the interests of the state of Texas in attracting the brightest students to attend state institutions, and should be amended. The current provision equates "residence" with "domicile" (Section 54.052 a), but then excludes students who move to Texas for college attendance from becoming Texas residents. Of course, the state has a perfect right to do this, and it joins many other states that treat student citizens the same way. However, I believe that "closing our borders" this way prohibits Texas from recruiting and attracting the greatest talent possible; when combined with the 10-times-Texas tuition provisions, the state has erected a great wall to college student migration, one that falsely assumes non-residents to

be a threat to Texas students.

The legislation itself is inconsistent in this regard, for it has erected several "end-runs" around Texas residency requirement and has singled out special groups for reducing or free tuition privileges. Sections 54.051 through 54.210 are chock-full of exemptions and special benefits having nothing to do with duration or domicile. Again, this is perfectly legal, if unwieldy. But the premise of a strict domicile rule is that a Texan, whose taxes go towards supporting Texas institutions, ought to attend a Texas college less expensively than a student from, say, New Mexico or Mexico. Why, then, erect a special provision for border state junior college students (Section 54.060) or for partial waiver to school valedictorians (Section 54.201)? The annual Coordinating

Board audits of exemptions require a review of 18 such provisions.

I urge the committee to repeal the first sentence of Section 54.054 ("A nonresident student classification is presumed to be correct as long as the residence of the individual in the state is primarily for the purpose of attending a educational institution.") and to appoint a special study group to report on Texas residency requirements, in time for the next legislative session.

. . . .

APPENDIX "M"

Texas Admin. Code § 21.23 (West 1993-94):

Persons classified as nonresidents upon first enrollment in an institution of higher education are presumed to be nonresidents for the period during which they continue as students. If such nonresident students withdraw from school and reside in the state while gainfully employed for a period of 12 months, upon reentry into an institution of higher education they will be entitled to be reclassified as residents for tuition purposes. Accumulations of summer and other vacation periods do not satisfy this requirement. Reclassification to resident status after residing in the state for 12 months cannot be based solely upon the student's or the student's spouse's employment, registration to vote, registration of a motor vehicle and

payment of personal property taxes thereon, or the securing of a Texas driver's license. The presumption of "nonresident" is not a conclusive presumption, however, and other facts may be considered to determine if the presumption has been overcome. Material to this determination are business or personal facts or actions unequivocally indicative of a fixed intention to reside permanently in the state. Such facts may include, but are not limited to, the length of residence and full-time employment prior to enrolling in the institution, the fact of full-time employment prior to enrolling in the institution, the fact of full-time employment and the nature of such employment while a student, purchase of a homestead with a substantial down payment, or dependency upon a parent or guardian

who had resided in Texas for at least 12 months immediately preceding the student's enrollment. All of these facts are weighed in the light of the fact that a student's residence while in school is primarily for the purpose of education and not to establish residence, and that decisions of an individual as to residence are generally made after the completion of an education and not before. Students classified as nonresident students shall be considered to retain that status until they make written application for reclassification in the form prescribed by the institution and are officially reclassified in writing as residents of Texas by the proper administrative officers of the institution. Application for reclassification must be submitted prior to the official census date of the relevant term.